

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY PAUL RHODY,

Defendant-Appellant.

UNPUBLISHED

March 15, 2005

No. 251664

Genesee Circuit Court

LC No. 01-007617-FC

Before: Murray, P.J., and Markey and O’Connell, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from a circuit court order denying his motion to withdraw his plea to violation of probation or for resentencing. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to second-degree criminal sexual conduct, MCL 750.520c(1)(a), and was sentenced to five years’ probation with the first year in jail. Defendant later pleaded guilty to violation of probation. Because defendant intended to move to Missouri, the court continued probation and remanded defendant to jail pending the move. Because defendant was unable to move to Missouri as planned, the court, over defendant’s objection, revoked probation and sentenced him to 36 to 180 months in prison. The court denied defendant’s postjudgment motion for relief.

A trial court has authority to resentence a defendant if the original sentence was invalid, but it “may not modify a valid sentence after it has been imposed except as provided by law.” MCR 6.429(A). The court rule codifies the case law holdings that “absent an error that renders a sentence invalid, a circuit court lacks authority to modify the sentence a defendant has begun to serve.” *In re Parole of Bivings*, 242 Mich App 363, 371; 619 NW2d 163 (2000); *People v Wybrecht*, 222 Mich App 160, 166-167; 564 NW2d 903 (1997). Because the court did not place defendant on a delayed sentence to see if the proposed move would take place as planned, see MCL 771.1(2), but instead entered a judgment of sentence continuing defendant on probation and lost authority to impose a different sentence. *People v Bingaman*, 144 Mich App 152, 158-159; 375 NW2d 370 (1984). Nonetheless, we decline to reinstate defendant’s original sentence for violation of probation because the plea to violation of probation was defective.

A guilty plea to violation of probation must be understanding, voluntary, and accurate. MCR 6.445(F)(3). If the defendant is advised of and understands the rights set forth in MCR

6.445(F)(1) and (2), and agrees, then the plea is understanding. Those subrules require that before accepting a guilty plea to violation of probation, the court must advise the defendant of the following: (1) that by pleading guilty, he gives up the right to a contested hearing, (2) the right to counsel if the defendant does not have a lawyer, and (3) the maximum possible jail or prison sentence for the offense. While the court rule does not require “rigid, unwavering, ceremonial incantation of its provisions under peril of mandatory reversal,” the “failure to follow the clear mandates of the rule . . . cannot produce an understanding, knowing, or voluntary plea.” *People v Alame*, 129 Mich App 686, 690; 341 NW2d 870 (1983).

The trial court advised defendant of his right to a contested hearing but neglected to advise him that his guilty plea constituted a waiver of the hearing or that he was otherwise giving up his right to a hearing by pleading guilty. In addition, the court advised defendant of the maximum sentence in a way that implied that defendant would not automatically be sentenced, but that instead, he would be charged anew with the underlying offense. Because the trial court did not “follow the clear mandates of the rule,” it abused its discretion in denying defendant’s motion to withdraw his plea. *People v Davidovich*, 238 Mich App 422, 425; 606 NW2d 387 (1999).

We reverse and remand to permit defendant to withdraw his plea to violation of probation. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Peter D. O’Connell